SUPREME COURT, STATE OF COLORADO

Case No. 80 SA 517

APPEAL FROM THE DISTRICT COURT, MONTROSE COUNTY, NO. 79CR11

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

vs.

RICHARD VELASQUEZ,

Defendant-Appellant.

Upon consideration of the Motion for Advisory Counsel, Petition to Reconsider Petition for Rehearing, Petition for Limited Remand to Trial Court and Discovery, and Petition for Stay and Bail Pending Review and Remand filed by the Defendant-Appellant herein, and now being advised in the premises,

It Is This Day Ordered that said Motion and Petitions shall be, and the same hereby are, Stricken.

BY THE COURT, APRIL 21, 1982

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

APR 22 1982

DAVID W. BREZINA
Court Clerk of the Supreme Court
Seal By L. Eldridge
Deputy Clerk

cc: Richard Velasquez
P.O. Box 700-01756
Canon City, CO 81212

William Morris
Assistant Attorney General

Clerk of the District Court
Montrose County Courthouse
300 So. First
Montrose, CO 81401

SUPREME COURT, STATE OF COLORADO
Case No. 80SA517
Appeal, District Court, Montrose County

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

vs.

RICHARD VELASQUEZ,

Defendant-Appellant.

ORDER

Upon consideration of the Petition for Rehearing filed by the Defendant-Appellant in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, MARCH 15, 1982.

cc: Richard Velasquez
Box 700-01756
Canon City, CO 81212

William Morris, Asst. A.G.
1525 Sherman Street, 3rd Fl.
Denver, CO 80203

Supreme Court
State of Colorado
Certified to be a true, true and correct copy

MAR 15 1982

DAVID W. BREENA
Court Clerk of the Supreme Court
Seal By Linda L. Maas
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF COLORADO

NO. 80SA517

THE PEOPLE OF THE STATE OF COLORADO,	)	
Plaintiff-Appellee,	)	
v.	)	February 15, 1982
RICHARD VELASQUEZ,	)	
Defendant-Appellant.	)	

Appeal from the District Court

of the

County of Montrose

Honorable Jerry D. Lincoln, Judge

EN BANC JUDGMENT AFFIRMED

J. D. MacFarlane, Attorney General
Richard F. Hennessey, Deputy Attorney General
Mary J. Mullarkey, Solicitor General
William Morris, Assistant Attorney General
Denver, Colorado

Attorneys for Plaintiff-Appellee

Jeffrey A. Springer
Denver, Colorado

Attorney for Defendant-Appellant

Richard Velasquez
Montrose, Colorado

Pro Se

JUSTICE QUINN delivered the opinion of the Court.

The defendant, Richard Velasquez, was convicted by a jury of four counts charging him with dispensing a dangerous drug, cannabis;[1] possession of narcotic drugs, namely morphine and codeine;[2] possession of more than one ounce of cannabis;[3] and carrying a concealed weapon.[4] His challenges on this appeal are several and include the claimed unconstitutionality of consensual electronic surveillance under Article II, Section 7, of the Colorado Constitution, the asserted illegality of his arrest and search incident thereto as well as a subsequent search of his automobile, the alleged violation of his statutory and constitutional rights to speedy trial, and a claim that he was denied effective assistance of counsel.[5] We affirm the judgment.

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1 Sections 12-22-404(1)(a) and 12-22-412(1), C.R.S. 1973 (1978 Repl. Vol. 5).

2 Sections 12-22-302 and 12-22-322, C.R.S. 1973 (1978 Repl. Vol. 5).

3 Sections 12-22-404(1) and 12-22-412(6) and (12)(d), C.R.S. 1973 (1978 Repl. Vol. 5).

4 Section 18-12-105(1), C.R.S. 1973 (1978 Repl. Vol. 8).

5 The defendant raises several other issues which we summarily dispose of here. First, the defendant raises an issue concerning his bail. Bail was originally set at $5,000 but was increased to $25,000 by the trial court shortly after a preliminary hearing. The proper method of contesting the reasonableness of bail is by an original proceeding to this court, Balltrip v. People, 157 Colo. 108, 401 P.2d 259 (1965), or by a petition pursuant to section 16-4-204(1), C.R.S. 1973 (1978 Repl. Vol. 8) and Crim. P. 46(c)(1) to review a bail increase. The defendant sought no such relief in this case and the issue of preconviction bail is therefore moot.

The defendant also claims that the search of his residence pursuant to warrant was illegal. The district attorney stated at a suppression hearing that no items seized from the defendant's home would be introduced at trial. The defendant acceded to this statement and made no request to suppress the fruits of the house search. At trial the prosecution did not offer into evidence anything obtained from the house search. Although the issue relating to the house search would appear to be moot, we have (Continued)

I.

The charges against the defendant arose from a drug transaction which occurred in Montrose County, Colorado, on December 22, 1978. Earlier that month, while working with the Colorado Bureau of Investigation as an informant, James Walsh met the defendant and purchased marijuana from him on three or four occasions prior to the events here at issue. On December 21 the defendant agreed to sell Walsh one pound of "sesamian marijuana" for $1300. The sale was scheduled for the next day at Walsh's room in the Will Rogers Motel in Montrose County. Walsh contacted Detective Sellers of the Montrose Police Department and received $1300 in recorded bills to make the purchase. During the morning hours of December 22 Detective Sellers and Agent Konkel of the Colorado Bureau of Investigation (CBI) placed an audio transmitter, with Walsh's consent, behind the headboard of the bed in his room. After Sellers and Konkel had stationed themselves in a car outside the motel, they saw the defendant arrive at about 1:00 p.m. in a Chevrolet automobile which he parked in the motel parking lot. The defendant then entered Walsh's room.

The officers monitored the ensuing conversation between the defendant and Walsh. When the defendant arrived he

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5 (Continued)
nonetheless reviewed the affidavit filed in connection with the application to search the defendant's home and are satisfied that there was probable cause for the issuance of the warrant.

The defendant also seeks resentencing under the 1979 version of H.B. 1589. The offenses charged in this case were committed prior to July 1, 1979, the effective date of H.B. 1589. Colo. Sess. Laws 1979, ch. 157, sec. 25 at 672. Due to the many times we have held that H.B. 1589 is not retroactive in its application, we reject the defendant's contention without further discussion. E.g., People v. Francis, ____ Colo. ____, 630 P.2d 82, n. 1 (1981).

told Walsh that he had no "sesamian pot" but he had brought two pounds of Columbian marijuana with him and, if Walsh purchased this marijuana, the defendant then would have enough money to purchase the "sesamian marijuana" for a later sale to Walsh. Walsh agreed to the purchase of the Columbian marijuana for $750. The officers saw the defendant leave the motel room and go to his car, where he removed a box and brown bag from the trunk, and then return to the room. Once back inside the room, the defendant weighed two bags of marijuana and Walsh paid him $750. After Walsh gave a prearranged signal by stating "this would make a nice Christmas present", the officers entered the room and arrested the defendant.

The officers recovered a .38 caliber loaded revolver from the defendant and a large sum of money, including the recorded money paid by Walsh. Seized from a coffee table in the room were a scale and a pound bag of marijuana. Another pound of marijuana was located in a paper sack on the floor. Immediately after the defendant's arrest the officers arranged for the towing of his automobile from the motel parking lot to a garage where the automobile was sealed. Later a warrant was issued for the search of the vehicle, based upon an affidavit of Detective Sellers reciting what Sellers and Agent Konkel heard and saw during the electronic surveillance and their arrest of the defendant and recovery of contraband in the motel room. Upon execution of the warrant a sawed-off shotgun, some small bags of marijuana and a trace of a black substance later determined to contain morphine and codeine were recovered from the defendant's vehicle.

A complaint was filed against the defendant in county court on January 3, 1979, and after a preliminary hearing the

matter was bound over to the district court. The defendant initially appeared in the district court with a deputy public defender on March 8, 1979 for arraignment. Defense counsel requested 30 days to file motions directed to the information prior to the entry of a plea. The court granted this motion but reserved September 17, 1979, for trial of the case. The trial date was selected after defense counsel acknowledged on the record that the six month speedy trial period would not begin to run until the arraignment and after he had rejected an earlier date due to a prearranged vacation.

Several days after the March 8 appearance the court ordered $1,920 in unmarked money previously seized from the defendant returned to him and granted him 30 days to retain private counsel. During the next three months the court granted several requests by the defendant for additional time to retain private counsel and to file motions. Ultimately the defendant retained a private attorney, who formally entered his appearance on July 23, 1979. This attorney filed various motions, including a motion to suppress various articles seized from the defendant, the motel room and the defendant's vehicle.

A hearing was held on the motion to suppress on August 27, 1979. The court denied the motion to suppress, ruling that Article II, Section 7 of the Colorado Constitution did not require a warrant to electronically monitor a conversation when one of the participants had consented to the monitoring, that the officers had probable cause and legal authority to arrest the defendant and search his person incident to the arrest, that the seizure of the defendant's vehicle was proper, and that the affidavit in support of the warrant to search the

vehicle established probable cause. The case was continued for trial commencing on September 17, 1979.

Although neither the defendant nor his attorneys ever sought to enter a not guilty plea subsequent to March 8, 1979, the defendant appeared with private counsel on the trial date and moved for dismissal of the charges on the basis that his right to a speedy trial had been violated. The court denied the motion to dismiss and, upon the defendant's refusal to enter a plea to the charges, entered a not guilty plea on his behalf pursuant to Crim. P. 11(d) and the trial commenced.

At trial, no recording or transcript of the monitored conversation between the defendant and Walsh was offered into evidence but Detective Sellers and Agent Konkel testified to the substance of what they had overheard while monitoring the conversation. The court admitted into evidence the marijuana, drug paraphernalia, recorded money and revolver seized during the course of the defendant's arrest as well as the other drugs and shotgun recovered from the defendant's vehicle. The jury found the defendant guilty of the felonies of dispensing a dangerous drug and possession of a narcotic drug, and guilty of the misdemeanors of possession and use of more than one ounce of cannabis and carrying a concealed weapon. Subsequently the defendant was sentenced on the felony convictions to concurrent terms of six to ten years and to concurrent terms of one year on the misdemeanor convictions. This appeal followed.

II.

The defendant argues that the state constitutional prohibition against unreasonable searches and seizures, Colo.

Const. Art. II, Sec. 7,[6] should be construed to require a warrant for the electronic transmission and monitoring of a defendant's conversations with another, in spite of the other party's consent to the electronic surveillance. The defendant concedes that under United States v. White, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971), no warrant is required for consensual electronic surveillance under federal constitutional standards. He urges us, however, not to follow White because its reasoning conflicts with realistic expectations of privacy.[7] We are not persuaded by his argument.

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6 Article II, Section 7, of the Colorado Constitution provides:

> "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing."

7 As a preliminary matter the defendant urges that White is inapplicable to this case because it was based in part on the non-retroactivity of Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), and, therefore, the post-Katz participant monitoring in this case is subject to the strictures of Katz. Subsequent to the White decision, however, the Supreme Court has made clear that White's rationale does apply to post-Katz consensual electronic surveillance. United States v. Caceres, 440 U.S. 741, 99 S. Ct. 1465, 59 L. Ed. 2d 733 (1979) (violation of IRS regulation prohibiting electronic monitoring without advance authorization from Attorney General does not raise "any constitutional questions"). Besides, as White pointed out,

> "Katz involved no revelation to the Government by a party to conversations with the defendant nor did the Court indicate in any way that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police." 401 U.S. at 749, 91 S. Ct. at 1124-25, 28 L. Ed. 2d at 457.

In White the United States Supreme Court reasoned that the use by government agents of electronic equipment to transmit and monitor the defendant's conversations with an informer, without a search warrant but with the informer's knowledge and consent, did not violate the Fourth Amendment to the United States Constitution:

> "Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights.... For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person ... (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency.... If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks." 401 U.S. at 751, 91 S. Ct. at 1125, 28 L. Ed. 2d at 458.

The protections of Article II, Section 7, of the Colorado Constitution, like its federal counterpart, are limited by reasonable expectations of privacy — that is, expectations which the law is prepared to recognize as legitimate. See People v. Gomez, ____ Colo. ____, 632 P.2d 586 (1981); People v. Becker, 188 Colo. 160, 533 P.2d 494 (1975). In determining the measure of constitutional protection under the warrant requirement of the Colorado Constitution, the proper

inquiry is not whether an individual defendant subjectively expected his ostensible accomplice in crime to preserve the confidentiality of their encounter and conversation. Rather, the proper inquiry is whether the defendant's expectation of confidentiality was constitutionally justified. Certainly, when a defendant meets with a police informant, whose role as such is concealed, in the informant's motel room for the purpose of selling him illegal drugs, such defendant has no legitimate expectation that his encounter and conversation with the informant may not later be used as evidence against him. If the law affords the defendant no legitimate expectation of privacy under these circumstances, neither should it protect him when the same informant permits the electronic recording and transmission of the same conversation taking place in the informant's room.

We recognize that United States v. White, supra, a plurality opinion, has not met with universal acceptance by state courts in determining the propriety of consensual electronic surveillance under state constitutional provisions.[8]

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[8] Some of the state decisions following White involved challenges to consensual electronic surveillance under a state constitutional prohibition of unreasonable searches and seizures, e.g., Hammond v. State, 354 So. 2d 280 (Ala. Crim. App. 1977); State v. Boone, 581 P.2d 571 (Utah 1978), while others dealt with challenges under a specific privacy guarantee under the state constitution, e.g., Franco v. State, 376 So. 2d 1168 (Fla. App. 1979) (specific Florida constitutional prohibition of unreasonable interception of private communications by any means); People v. Mosley, 63 Ill. App. 3d 437, 379 N.E.2d 1240 (1978) (specific Illinois constitutional prohibition of interception of communications by eavesdropping devices or other means). Most courts which have departed from White have done so on the basis of a provision in the state constitution specifically guaranteeing a right of privacy. See, e.g., State v. Glass, 583 P.2d 872 (Alaska 1978) (constitutional amendment to Alaska Constitution providing that right of privacy shall not be infringed and also state constitutional prohibition of unreasonable searches and seizures); White v. Davis, 13 Cal. 3d 757, (Continued)

However, we have relied upon White in several cases involving suppression issues. For example, in People v. Morton, 189 Colo. 198, 539 P.2d 1255 (1975), cert. denied 423 U.S. 1053, 96 S. Ct. 783, 46 L. Ed. 2d 642 (1976), we held that the warrantless electronic recording by a private investigator, working with the police, of the defendant's conversation with the investigator in the latter's automobile did not violate the defendant's Fourth Amendment rights, nor did the recording constitute an "unlawful interception" entitling the defendant to suppression under section 16-15-101 et seq., C.R.S. 1973 (1978 Repl. Vol. 8), which deals with wiretapping and eavesdropping. Again relying on White, we held in People v. Edmonds, 195 Colo. 358, 578 P.2d 655 (1978), that a defendant who connected his own telephone to his apartment manager's telephone line, to which the police thereafter connected a tape recorder with the manager's consent, did not have a "valid expectation of privacy while speaking on his extension of the manager's line." 195 Colo. at 365, 578 P.2d at 661.

Although neither Morton nor Edmonds involved a construction of our state constitutional guarantee against unreasonable searches and seizures, we see no reason to depart from White's rationale in the context of the specific facts of this

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8 (Continued)
533 P.2d 222, 120 Cal. Rptr. 94 (1975) (right of privacy amendment to California constitution); Tollett v. State, 272 So. 2d 490 (Fla. 1973) (Florida constitutional prohibition of unreasonable interception of private communications by any means); State v. Brackman, 178 Mont. 105, 582 P.2d 1216 (1978) (Montana constitutional provision stating that the right of privacy "shall not be infringed without the showing of a compelling state interest"). In People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975), which involved participant electronic monitoring in the defendant's home, the Michigan Supreme Court declined to follow White in its interpretation of its state constitutional protection against unreasonable searches and seizures.

case. Accordingly, we hold that the warrantless electronic transmission and monitoring of conversations taking place between a suspect and a police informant in the informant's motel room, when the informant has previously consented to the electronic surveillance, does not violate Article II, Section 7, of the Colorado Constitution.

III.

The defendant next argues that his arrest constituted an unreasonable seizure of his person under the United States and Colorado Constitutions because it was effected by a Montrose police officer outside the Montrose city limits, there was not probable cause for the arrest, and the arrest was made without a warrant. We reject these claims.

The record reflects that CBI Agent Konkel, who had statewide power of arrest, was both present and principally responsible for making the arrest. Also, it is undisputed that Detective Sellers, a Montrose city police officer, had been specially deputized as a county sheriff. These facts, by themselves, answer the defendant's claim with respect to the arrest powers of the officers who took him into custody. People v. Schultz, ___ Colo. ___, 611 P.2d 977 (1980); see also People v. Wolf, ___ Colo. ___, 635 P.2d 213 (1981).

Probable cause also existed for the defendant's arrest. In fact, during the suppression hearing the defendant with good reason conceded there was probable cause for his arrest. The arresting officers were both eye-witnesses and ear-witnesses to the criminal conduct of the defendant immediately prior to taking him into custody. E.g., Hill v. California, 401 U.S. 797, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971); People v. Chavez, ___ Colo. ___, 632 P.2d 574 (1981); People v. Johnson, 199 Colo. 68, 605 P.2d 46 (1980).

The defendant's claim that his warrantless arrest was constitutionally infirm is similarly without merit. There is no constitutional requirement for an arrest warrant when, as here, the arrest is effected in the motel room of another during the perpetration of a crime. See, e.g., United States v. Watson, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976); People v. Burns, ____ Colo. ____, 615 P.2d 686 (1980).

IV.

Next the defendant claims that the seizure of his automobile upon his arrest and the subsequent vehicular search pursuant to warrant violated the federal and state prohibitions against all unreasonable searches and seizures. We find no such constitutional violation in this case.

Due to its mobility, the opportunity to search an automobile is fleeting. If an effective search is to be made, either the vehicle must be immediately searched without a warrant or the car itself must be seized and held for whatever period is necessary to obtain a warrant.

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." Chambers v. Maroney, 399 U.S. 42, 52, 90 S. Ct. 1975, 1981-82, 26 L. Ed. 2d 419, 428 (1970).

The location of the vehicle in a motel parking lot, rather than a public street, does not affect the legality of the initial seizure. As long as there was probable cause to search the vehicle, public access to the parking lot created a sufficient exigency to permit the immediate seizure of the vehicle under the automobile exception to the warrant requirement. See, e.g., Cardwell v. Lewis, 417 U.S. 583, 94 S. Ct.

2464, 41 L. Ed. 2d 325 (1974); United States v. Matthews, 615 F.2d 1279 (10th Cir. 1980); People v. Meyer, ____ Colo. ____, 628 P.2d 103 (1981).

That probable cause existed to search the vehicle is evident from what the arresting officers saw and heard immediately prior to the arrest. In particular, the defendant's offer to sell two pounds of Columbian marijuana to Walsh, his exit from Walsh's motel room, his removal of a box and a brown paper bag from the trunk of his vehicle, his return to Walsh's motel room to complete the drug sale, and the seizure of the illegal drugs upon the defendant's ensuing arrest in the motel room, were first-hand observations which in their totality provided the officers with probable cause to believe that the defendant's vehicle contained illegal drugs. Thus, these facts justified the immediate seizure of the vehicle and, upon their incorporation in the affidavit, sufficiently established probable cause for the issuance of the search warrant.[9]

V.

We next consider the defendant's claim that he was denied his statutory and constitutional rights to a speedy

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[9] Although not raised before the trial court, the defendant for the first time asserts that the affidavit for the search warrant was technically insufficient because of the initial clause which stated: "Charles Sellers, an Investigator for the Montrose Police Dept. affiant, now appears before the undersigned _____, authorized to issue warrants in criminal cases...." The defendant argues that due to the blank lines appearing after the word "undersigned" the identity of the office of the person before whom the affiant appeared was not established by the affidavit. There is no merit to this argument. The affiant signed the affidavit and his signature was subscribed and sworn to before Richard J. Brown, who acknowledged the affiant's signature by signing the affidavit and by expressly identifying his office as Judge of the Montrose County Court, Montrose, Colorado.

trial. Section 18-1-405(1), C.R.S. 1973 (1978 Repl. Vol. 8) provides that if a defendant is not brought to trial "within six months from the date of the entry of a plea of not guilty, he shall be discharged from custody ... and ... the pending charges shall be dismissed ...." See also Crim. P. 48(b)(1). If a defendant intends to seek the benefit of this six month period, it is incumbent upon him to enter a plea of not guilty so that the period of limitation may commence. Saiz v. District Court, 189 Colo. 555, 542 P.2d 1293 (1975). A review of this record demonstrates that at no time prior to trial did the defendant or his attorneys ever seek to enter a plea of not guilty and activate the statutory speedy trial period.

When the defendant appeared in court on March 8, 1979, for arraignment, the court acceded to his attorney's request to postpone the entry of a not guilty plea for 30 days in order to permit the filing of motions under Crim. P. 12(b). Defense counsel on this occasion expressly acknowledged on the record in the presence of the defendant that the six month speedy trial period would not begin to run until a plea of not guilty had been entered. After offering the defendant an earlier trial date in August 1979, which was rejected due to the defense attorney's vacation plans, the court reserved a trial date of September 17, 1979, with the understanding that the arraignment would take place in due course. However, in spite of several court appearances, neither the defendant, his public defender, nor his retained attorney ever sought arraignment during the course of the proceedings subsequent to March 8, 1979. Thus, when the defendant requested a dismissal of the case on September 17, 1979, the six month

period had not yet begun to run. Saiz v. District Court, supra; People v. Romero, 196 Colo. 520, 587 P.2d 789 (1978).[10]

Nor do we find any violation of the defendant's rights under the Sixth Amendment to the United States Constitution and Article II, Section 16, of the Colorado Constitution. The constitutional right to a speedy trial attaches when a defendant is formally accused by a charging document, such as a criminal complaint, information or indictment, United States v. Marion, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); and the burden of proving a violation of that right is on the defendant. People v. Small, ___ Colo. ____, 631 P.2d 148 (1981); Gelfand v. People, 196 Colo. 487, 586 P.2d 1331 (1978). Whether a defendant's speedy trial right was violated is determined by an ad hoc balancing of four factors: the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); People v. Small, supra.

In this case the period intervening between the initial filing of a criminal complaint in the county court on January 3, 1979, and the trial on September 17, 1979, was neither excessive nor unjustified. Nor does the record disclose any assertion of the defendant's constitutional right to

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[10] Furthermore, the period of delay in arraignment from March 8, 1979, to July 23, 1979, when the defendant's privately retained attorney entered his appearance, was caused by or created at the instance of the defendant who subsequent to March 8 requested and received several continuances to retain private counsel and to file motions. Under such circumstances the period from March 8 to July 23 may not properly be assessed against the statutory speedy trial limitation. Saiz v. District Court.

a speedy trial prior to the trial date itself. Rather, the record strongly suggests that the defendant "hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges" without, however, really wanting to be tried. Barker v. Wingo, supra, 407 U.S. at 535, 92 S. Ct. at 2194, 33 L. Ed. 2d at 119. Finally, the defendant has failed to establish that his defense to the charges was in any manner prejudiced by the period intervening between the filing of the complaint and the trial date. The defendant's speedy trial claims are simply without merit.

VI.

The defendant's final contention is that he was denied effective assistance of counsel, U.S. Const. Amend. VI; Colo. Const. Art. II, Sec. 6, because he was not able to hire an attorney until July 1979, thus leaving his attorney with insufficient time to prepare for trial. A defendant is not constitutionally entitled to errorless counsel but rather to reasonably effective assistance of counsel. People v. White, 182 Colo. 417, 514 P.2d 69 (1973); People v. Gonzales, 37 Colo. App. 8, 543 P.2d 72 (1975). In determining whether an accused has been denied his constitutional entitlement, a reviewing court must consider all the attendant circumstances underlying the entire course of proceedings and then determine whether there was a denial of fundamental fairness. See, e.g., People v. Moody, ___ Colo. ___, 630 P.2d 74 (1981); People v. White, supra. A review of the record in this case does not support the defendant's claim.

Upon his formal entry of appearance on July 23, 1979, the defendant's attorney filed a motion for discovery which the district attorney confessed and a motion to suppress which

was vigorously argued on August 27, 1979. Additionally, defense counsel ordered and received a transcript of the preliminary hearing more than a month prior to trial. The record of the trial reveals that defense counsel thoroughly cross-examined the prosecution's witnesses, made numerous evidentiary objections throughout the trial, successfully argued a motion for a judgment of acquittal on the charge of possession of a narcotic drug for sale, section 12-22-322 (1)(a), C.R.S. 1973 (1978 Repl. Vol. 5), and presented an adroit summation to the jury in the face of overwhelming evidence of guilt. Such representation could not have been given without extensive preparation prior to trial. There is not even a suggestion in the record that the defense counsel's representation was anything less than competent.

The judgment is affirmed.

FILED
JUNE 10, 1982
(confirmed by tel.

IN THE SUPREME COURT OF THE STATE OF COLORADO

CASE NO. 80SA517

APPEAL FROM THE DISTRICT COURT, MONTROSE COUNTY, STATE OF COLORADO 79CR11

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

vs.

RICHARD VELASQUEZ,

Defendant-Appellant.

Notice is hereby given that Richard Velasquez, the Defendant-Appellant and herein after referred to as Appellant, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Colorado of February 16, 1982, rehearing denied March 15, 1982 (affirming the judgment of conviction), entered on March 19, 1982.

This appeal is taken pursuant to 28 USCA §1257 and Supreme Court of the United States of America Rules 10-15 and 53.

Appellant was convicted on September 18, 1979 in Montrose District Court, Montrose County, State of Colorado of the crimes of, Count I: Dispense dangerous drug (F) in violation of 12-22-404 (1) (a), C.R.S. 1973, as amended in 1978; Count II: Possess more than oz. cannabis (M) in violation of 12-22-404 (1) (L), C.R.S. 1973, as amended 1978; Count IV: Carry concealed firearm (M-2) in violation of 18-12-105 (1) (b), C.R.S. 1973, as amended 1978; Count V: Possession of a narcotic drug (F) in violation of 12-22-302, C.R.S. 1973, as amended 1978, was sentenced on October 10, 1979 to a minimum of six (6) years and maximum of ten (10) years at the Colorado State Penitentiary on Count I; one year (1) in Montrose County Jail on Count II; one year (1) in Montrose County Jail on Count IV; a minimum of six (6) years and maximum of ten (10) years to the Colorado State Penitentiary on Count V, all terms to run concurrently. Appellant is presently confined at the Colorado Department of Corrections at Canon City, Colorado at the Shadow Mountain Facility.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The entire record that was included in the transcript of the record on

appeal to the Supreme Court of Colorado. This includes all briefs, motions, judgments and orders entered by Appellant, Appellant's former attorney, and the Appellate courts in the above captioned cause.

2. The entire record of the transcript of the record on file with the District Court of Montrose, Montrose County, State of Colorado. This includes all original process and pleadings on file in the trial court, including all judgments and orders of the court, all exhibits, the reporter's original transcript of trial, motion to suppress, arraignment and all other hearings held in the court below. This is necessary to properly review the issue of ineffective assistance of counsel.

3. The entire record of the hearing held in the Supreme Court of Colorado on February 16, 1982 and the entire record of all subsequent proceedings held in this case. This includes a copy of the Opinion of the Court; a copy of Appellant's Letter to the Court and Motions dated February 16, 1982; Appellant's Petition For Rehearing Pursuant to C.A.R. 40 and accompanying motions dated March 2, 1982; Appellant's Petition For Rehearing Pursuant to C.A.R. 40 and accompaning motions dated March 22, 1982; the letter written to the Honorable Paul V. Hodges, Chief Justice of the Supreme Court of Colorado, dated April 13, 1982 and the Motion For Advisory Counsel dated April 13, 1982. The letter written to Honorable Paul V. Hodges was accompanied by the Petition and motions of March 22, 1982 as those papers were sent back to Appellant rather than being filed in the Court. The Montoya brief, NO. 80CA1257 is to be included in the record also and was previously submitted with the Petition of March 22, 1982. All judgments and orders of the Supreme Court of Colorado concerning this case are also to be included in the record and all transcripts of all hearings held by such court concerning this matter.

3. All briefs, motions and pleadings of whatever nature that the prosecution has filed with the courts concerning this case.

III. The following questions are presented by this appeal:

Appellant has decided to change the order of the listing of his points of error and list them in order of merit rather than as they were previously raised. This will be further explained in Appellant's Jurisdictional Statement. Appellant has also discovered that some of his previous arguments were actually several arguments rather than one and thus Appellant will number the main arguments, there were seven (7) original arguments, and letter the other arguments with a small letter in parenthesis. This way the arguments relating to

the same issue will be grouped together under one main heading.

1. That due to irreconcilable differences between Appellant and his attorney and the fact that Appellant's Attorney refused to appeal many of the issues that had been raised during the trial and pretrial proceedings and that had been previouly discussed as being meritorious and which would be part of Appellant's appeal, Appellant decided to proceed Pro Se and entered these arguments pursuant to the "deliberate by-pass rule" as stated in Fay v. Noia and "cause" and "actual prejudice" as stated in Wainwright v. Sykes. Appellant also had many disagreements with his attorney concerning the handling of every aspect of this case. This is particularly true of the fact that no continuance was requested of the trial despite the fact that Appellant's attorney had no defense prepared and this is particularly evident from his closing argument. Thus it was error for the Supreme Court of Colorado not to grant relief on the original issues; to summarily dispose of some of Appellant's arguments; and not to grant relief or a limited remand to the trial court on the issues that Appellant requested a Limited Remand to the trial court for. All the issues presented by appellant are meritorious and are plain error and thus relief should have been granted on all issues and a new trial or dismissal of all charges should have been granted.

2. That the Court erred in ruling that the seizure and later search of Appellant's vehicle were incident to arrest because:

(a). Appellant was not arrested in the vehicle but in the motel room. Only the search and seizure conducted inside the motel room was incident to arrest.

(b). The arrest in the motel and seizure of the evidence therein did not provide probable cause to seize and search Appellant's vehicle. Nothing said or done before, during or after the arrest provided probable cause to seize the vehicle or search it. There were also no exigent circumstances requiring immediate seizure of the vehicle.

(c). The vehicle was parked on private property and thus not subject to seizure for any reason. No warrant of forfeiture; no violation of law; and no request by Appellant or anyone else was ever presented to warrant this seizure and later search.

(d). The seizure and search of Appellant's vehicle was also not incident to arrest as it was not a search for evidence of the crime for which Appellant was arrested. The search was a search for evidence of a different crime other than the alleged sale in the motel room and any evidence found could

not properly be used to support the crime of alleged sale in the motel room. Thus the statements in the affidavit describing the sale do not support a probable cause finding to seize and search Appellant's car.

(c). That the vehicle was impounded, towed to a garage and sealed by the police and later searched pursuant to a search warrant and thus the search was not incident to arrest but must depend on the sufficiency of the search warrant and affidavit. The Appellant had been arrested and handcuffed inside the motel room and taken from there to jail and incarcerated and thus had no access to the vehicle or its contents at any time.

2A. That the court erred in ruling that the search warrant and affidavit are sufficient and provided probable cause as the warrant and affidavit are fatally defective for the following reasons:

(a). No probable cause to search the vehicle was presented in the warrant. There was only possible probable cause to search Appellant's home. Nothing was written in the warrant nor was there any affirmation that provided probable cause to search the vehicle. In fact the affiant stated at the suppression hearing that he had no probable cause to suspect contraband was in the vehicle. The affidavit contained no underlying facts and circumstances on which the affiant based his conclusions that a further quantity of dangerous drugs and/or traces of marijuana were located in Appellant's car. There was no statement of any kind of personal knowledge or sighting by the affiant, the informant, or anyone else of any contraband ever being in the vehicle. Thus the search of the car was an exploratory search.

(b). The search of the suitcases and other containers was illegal as it was done without a warrant and without probable cause.

(c). The warrant and affidavit was also fatally defective by the use of the word "may" by the affiant in the phrase, "a further quantity of dangerous drugs and/or traces of marijuana <u>may</u> be located in the above described car", as this further provides proof that the search was exploratory and that the affiant had no probable cause to search but was simply guessing as to what he would find.

(d). That the use of the words "dangerous drugs" and "marijuana" also made the warrant and affidavit fatally defective and further proved the search to be exploratory. The words "dangerous drugs" are vague and could mean any number of various drugs. The only type of drug mentioned in the affidavit was marijuana and is the only drug that probable cause, if any, could be found for. The warrant and affidavit stated "traces of marijuana" and none were found or

searched for. Only the containers were searched. Thus the warrant and affidavit failed to particularly describe the place to be searched or the things to be searched for and seized.

(e). The warrant and affidavit are also fatally defective in that the blanks are not properly filled in. The space in the affidavit, for the car search, was not filled in which states who the affiant appeared before and who is authorized to issue warrants in criminal cases. It also fails to state where the car is located. The search warrant also fails to state which Judge of what court signed the warrant.

(f). That the alleged search for traces of marijuana was illegal as not based on probable cause and it was a search for something that is not a crime.

Thus the Court should have remanded this case for a new trial suppressing all evidence found in the car search or in the alternative dismissed the charges.

3. That the Court erred in ruling that the record shows that Appellant was represented by effective assistance of counsel at all stages of the proceedings. The record plainly shows that Appellant was ineffectively represented by counsel in all stages of the proceedings for the following reasons:

(a). The most obvious example of Appellant's Attorney's incompetance appears in his closing argument at trial. It also shows his lack of preparation of a proper defense. He repeatedly made derogatory comments concerning Appellant and stated that Appellant was guilty and of bad character among other comments. He in effect entered a plea of guilty for Appellant which is improper as only the defendant can enter a plea of guilt on his behalf.

(b). The Court also erred in dismissing the public defender from the case as Appellant was indigent and was thus deprived of assistance of counsel. The money returned to Appellant was not sufficient justification to require that Appellant hire his own attorney. The amount involved was not sufficient to allow Appellant to make bail or to hire an attorney let alone both and thus the public defender should have been kept on at least until Appellant could get an attorney on his own.

(c). The attorney that Appellant finally did hire did not have sufficient time to investigate all possible errors pertaining to this case and which could have been raised in the pretrial proceedings and he did not have time to properly prepare for trial. Thus he should have requested a continuance of the trial. He also did not perfect a proper appeal of all the errors that he had raised in the pretrial proceedings, trial proceedings and motion for new trial.

(d). The poor performance of Appellant's attorney is also demonstrated by his failure to raise all the issues that he should have. There were also many issues pertaining to the issues that he did raise which should have been raised and could have by any experienced attorney, which Appellant's attorney was, as they are all basic issues which are plainly stated in the law books. This is particularly true since Appellant did not have much problem finding these errors and he had no previous legal experience.

(e). Other errors which Appellant's attorney should have raised and appealed are:

(1). He failed to introduce the inaudible tape recording into evidence. His failure to analyze the tape recording was also incompetant. The tape recording would have proved to be exculpatory evidence for Appellant.

(2). He failed to adequately argue and investigate the circumstances surrounding the identification of the substance charged in Count V. The evidence was not sufficient to properly identify this substance as a narcotic. It was not properly identified at all. Even if it did contain morphine and codeine it could have possibly been a drug in Schedule III or V of the Schedule of Controlled Substances.

(3). That Appellant was convicted on Counts I and II in violation of the Constitutional proscriptions against double jeopardy. The same evidence was used to convict Appellant on both Counts.

(4). That the evidence was insufficient to warrant a conviction for sales in Count I. The evidence showed that Appellant never solicited or brought about a sale but showed that the informant was responsible for this. Thus Appellant was only guilty of possession for sale or simple possession if anything.

(5). That the Jury instructions were inadequate to properly advise the jury as to all the elements of the crimes charged in this case and thus plain error was also committed in this respect.

Thus the Court should have granted Appellant a new trial or in the alternative should have dismissed all charges.

4. That the Court erred in not sentencing Appellant under the presumptive range of the new sentencing bill, which became effective prior to Appellant's trial and prior to the time Appellant obtained counsel, for the following reasons:

(a). Defendants are entitled to the benefits of amendatory legislation which mitigates the penalty for crimes when the relief is sought before finality has attached to the judgment of conviction. Thus Appellant is entitled to be

sentenced under § 23 of the first version of H.B. 1589. However, if for some reason the Court rules that this is not so then Appellant is entitled to be sentenced under § 25 of the second version of H.B. 1589. Both became effective on the same date.

(b). That additional changes in the law at the 1981 Colorado Session of the General Assembly contain provisions which apply to Appellant and thus Appellant is also entitled to be sentenced under this amendatory legislation also and thus have his sentence reduced.

5. That the Court erred in ruling that Appellant had not been denied his Constitutional and Statutory right to a speedy trial for the following reasons:

(a). That the requirement that a plea be entered before the speedy trial time period begins is unconstitutional because it establishes a lower standard than is required by the Federal Constitution rather than a higher standard. It creates a standard whereby the Courts can intentionally bypass a defendant's speedy trial rights. It also creates a violation of equal protection between defendants who plead and those who do not.

(b). That Appellant was not properly advised by the court nor the public defender of his speedy trial rights.

(c). That the single continuance of more than six months violates Appellant's statutory right to a speedy trial as the Colorado statutes state that no single continuance shall exceed six months.

(d). That avoiding the speedy trial time period for the convenience of allowing the public defender a vacation is unconstitutional. The public defender should have been ordered to appear on the date available or new counsel should have been appointed.

(e). That it is not a requirement in Colorado that a defendant demand a speedy trial before he is entitled to the benefits of a speedy trial.

(f). That Appellant did not request any continuances of trial and no continuances were given in this case. Only additional time was given to obtain counsel. Thus this time cannot be excluded from the speedy trial time period.

(g). That a plea was actually entered for Appellant by the Court at arraignment, the date of trial setting, as a trial date should not be set until a plea has been entered. The Colorado statutes also contain a provision for the Court to enter a plea of not guilty should the defendant fail to plead. Thus a plea was actually entered at arraignment.

Thus all charges should have been dismissed against Appellant as his speedy trial rights were violated.

6. That the Court erred in ruling that the police had proper jurisdiction to conduct an investigation outside the city limits of Montrose and to also rule that they had jurisdiction to arrest Appellant for the following reasons:

(a). The Montrose City Police have no jurisdiction to conduct investigations nor effect arrests outside the city limits without a warrant.

(b). The Colorado Bureau of Investigations (CBI) did not conduct this investigation in conjunction with the Montrose Police Department. They only participated in an advisory capacity. The fact that they were present on the scene of the crime as witnesses and to effect the arrest is without merit as they were only there at the request of the Montrose Police Department as advisors only. Their presence was the result of the illegal investigation conducted by the Montrose Police Department and was effected without probable cause or a warrant of any kind.

(c). The fact that a Montrose City Police Officer had been specially deputized as a county sheriff is without merit. An Officer cannot be a City Police Officer and a Sheriff at the same time and no such provision is contained in either the Colorado Statutes or the Montrose City ordinances. In fact the Colorado Statutes state to the contrary.

Thus the investigation, arrest, and subsequent search and seizures conducted in this case should have been ruled illegal and all charges dismissed.

7. That the court erred in ruling that the warrantless electronic monitoring was not illegal for the following reasons:

(a) A warrant is required for all searches and seizures to be reasonable. The Court also failed to rule on the Federal Constitutional issue but only ruled on the Colorado Constitutional issue despite discussing Federal case law. This warrantless electronic participant monitoring violated the Federal Constitution as well as the Colorado Constitution. A warrant should have been obtained prior to the bug being placed in the room and prior to authorizing the agents to listen and record the conversation.

(b). The monitoring was illegal and unreasonable as the bug was placed in the room behind the headboard of the bed rather than on the person of the informant.

(c). It was error to allow the agents listening to the conversation from outside the motel and not introduce the tape recording itself. Without the tape recording all testimony pertaining to the conversation in the motel

room was not accurate. The statements by the informant concerning the prior alleged sales was vague, uncertain, and uncorroborated as was the rest of his testimony. The testimony of the agents was also vague, uncertain, and uncorroborated.

Thus this was an illegal warrantless participant electronic monitoring and all evidence should have been suppressed and all charges dismissed.

8. That the Court erred in not ruling that the errors presented to the court on appeal were in violation of both the Federal and State Constitutions. Appellant raised both Federal and State Constitutional arguments concerning all issues. It appears that the Court did not rule on the Federal question concerning the warrantless participant electronic monitoring however and is the reason Appellant added
^8. to this Notice of Appeal.

9. That the Court erred in not granting Appellant a Rehearing as Appellant was not notified when the hearing was to be and thus was not given the opportunity to present a supplemental or reply brief prior to the hearing and thus was deprived of a hearing pertaining to all the additional research that he had done between the time that he filed his Opening Brief, May 12, 1981, and the time of the hearing, February 15, 1982. The Court also misinterpreted some of the issues and also ruled contrary to some of the arguments than what was presented in the briefs.

10. That the Court erred in not granted a limited a remand to the trial court in order to present many of the new issues that Appellant had discovered in his research and that had not been raised below and thus all state remedies had not been exhausted. A remand should have been granted in order to allow Appellant to exhaust all remedies on all issues and thus be able to present all issues to the United States Supreme at the same time in the proper fashion.

DATED JUNE 7, 1982.

Respectfully Submitted

Richard Velasquez

Richard Velasquez, Pro Se #01756
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, Colorado 81212

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Notice of Appeal to The Supreme Court of the United States of America upon all parties herein by depositing copies of same in the United States mail, certified mail, at Shadow Mountain Correctional Facility, Canon City, Colorado this 7th day of June 1982, addressed as follows:

Clerk of the Supreme Court
State of Colorado
Colorado Judicial Building
2 East 14th Avenue
Denver, CO 80203

William Morris
Assistant Attorney General
Office of the Attorney General
1525 Sherman Street
3rd floor
Denver, CO 80203

Hon. Jerry D. Lincoln, Judge
Montrose County Courthouse
300 So. First
P.O. Box 368
Montrose, CO 81401

Clerk of the District Court
Montrose County Courthouse
300 So. First
P.O. Box 368
Montrose, CO 81401

Office of the Clerk
Supreme Court of the United States of America
1 First Street, N.E.
Washington, D.C. 20543

Richard Velasquez

Richard Velasquez, Pro Se #01756
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, CO 81212

81-647

DISM

STATE OF COLORADO, ss.

IN THE SUPREME COURT THEREOF.

THE PEOPLE OF THE STATE OF COLORADO,

To the District Court of Montrose County and State of Colorado, Greeting:

WHEREAS, lately in the District Court of Montrose County State aforesaid, in a certain cause therein pending between The People of the State of Colorado Plaintiff, and Richard Velasquez Defendant, the judgment of said District Court in said cause rendered was against the said Defendant

AND WHEREAS, the said cause was brought into our SUPREME COURT OF THE STATE OF COLORADO, from the Montrose County District Court.

AND WHEREAS, at the January Term of our Supreme Court, in the year of our Lord one thousand nine hundred and eighty-two, the said cause came on to be heard before our said SUPREME COURT on the 16th day of February, A. D. 1982, (the same being one of the Juridical days of said term) and the following proceedings were had and entered of record in said cause, to-wit:

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

No. 80SA517 vs.

RICHARD VELASQUEZ,

Defendant-Appellant.

Appeal, District Court, Montrose County; No. 79CR11

This cause having been brought to this court as an appeal from the District Court of Montrose County, and having been heretofore submitted to the consideration and judgment of the court, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED and adjudged that the judgment of said District Court shall be, and the same hereby is, Affirmed.

Now, Therefore, this cause is remanded to you, the said District Court, in and for the said Montrose County and State aforesaid, that such further proceedings may be had in said cause as shall conform to the judgment of this Court, entered as aforesaid, as also with the opinion filed therein.

WITNESS the HONORABLE PAUL V. HODGES Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City of Denver, this 19th day of March, A. D. 19 82.

DAVID W. BREZINA
Clerk Supreme Court.
By Linda L. Macias
Deputy.

Velasquez